REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **Review Application No. 93/2007 & CM Nos.3392-93/2007 in LPA No.106 OF 2007**

% **Date of Decision** : 19th March, 2007.

MCD .... Appellant.
Through None.

VERSUS

ANIL PRAKASH. .... Respondent.
Through Mr.Raman Duggal, Advocate.

CORAM:

HON'BLE DR. JUSTICE MUKUNDAKAM SHARMA, CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgement?

2. To be referred to the Reporter or not ?

3. Whether the judgement should be reported in the Digest ?

SANJIV KHANNA, J:

CM No.3393/2007

Allowed subject to all just exceptions.

R.A. No.93/2007 & CM No.3392/2007

1. We had allowed the Appeal filed by the appellant vide Order dated 27th February, 2007 and vacated the Stay Order dated 31st January, 2007 granted by the learned Single Judge. These applications for Stay and Review have now been filed by the respondent, Mr. Anil Prakash.
2. Learned counsel for the applicant was heard at length for more than 30 minutes. Learned counsel wanted us to re-hear the matter on merits. However, this cannot be permitted and allowed in view of Order XLVII of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code, for short) and limited power of review which this Court has. We cannot re-examine and re-appreciate the contentions raised and decided in the original order, while deciding a review application. Power of this Court is circumscribed by the conditions specified in Order XLVII of the Code.
3. Learned Counsel relied upon ***Common Cause, a***

Registered Society versus Union of India and others, reported in (1999) 6 SCC 667. In this case the Supreme Court has held that where error or mistake is made by the Supreme Court or the High Courts in exercise of their plenary powers under Articles 32 and 226 of the Constitution of India, the mistake once pointed out should be corrected, as an error made by the court should not cause prejudice to any one. The said decision has no application to the present case as for applying the said principle there should be an error or mistake made by the court on erroneous assumption, which results in miscarriage of justice. Similarly, in ***Bhavnagar University versus Platina Sugar Mill (P) Limited and others*** reported in (2003) 2 SCC 111, the Supreme Court has clarified that facts or statement mentioned in any order or judgement is conclusive of what is stated and cannot be contradicted by filing affidavit or other evidence by parties. In case of error, the remedy available to a party is to file a review application before the same

court. However, in some cases, a party may resile from the statement made and the appellate court can permit him to question the decision of non-appreciation of law, which had caused injustice. Certainly this Court has power to review its earlier decision in case any contention as raised has been ignored or there is a mistake apparent on the face of the record. However, the present case does not fall in the said exceptions. The contentions as raised had been noticed in the Order dated 27th February, 2007 and had been duly considered. There can also not be any dispute that power of the Court under Article 226 of the Constitution of India are not fettered by normal legal constraints and in a given case the Court may correct its own mistake. However, we do not feel that in the present case the said principle is required to be applied. Suffice it is to refer to the case of ***Meera Bhanja versus Nirmala Kumari Choudhury*** reported in (1995) 1 SCC 170. In this case the contention raised was that the power to review inheres in every court of plenary jurisdiction

to prevent miscarriage of justice or to correct grave and palpable errors committed by it. The Supreme Court reversed the judgement of the Division Bench of the High Court and observed as follows:

> "**15.** In our view the aforesaid approach of the Division Bench dealing with the review proceedings clearly shows that it has overstepped its jurisdiction under Order 47, Rule 1 CPC by merely styling the reasoning adopted by the earlier Division Bench as suffering from a patent error. It would not become a patent error or error apparent in view of the settled legal position indicated by us earlier. In substance, the Review Bench has reappreciated the entire evidence, sat almost as court of appeal and has reversed the findings reached by the earlier Division Bench. Even if the earlier Division Bench's findings regarding C.S. Plot No. 74 were found to be erroneous, it would be no ground for reviewing the same, as that would be the function of an appellate court. Learned counsel for the respondent was not in a position to point out how the reasoning adopted and conclusion reached by the Review Bench can be supported within the narrow and limited scope of Order 47, Rule 1 CPC. Right or wrong, the earlier Division Bench judgment had become final so far as the High Court was concerned. It could not have been reviewed by reconsidering the entire evidence with a view to finding out the alleged apparent error for justifying the invocation of review

powers. Only on that short ground, therefore, this appeal is required to be allowed."

4. However, to satisfy the applicant-respondent we have examined the contentions raised and the decisions relied upon by him. Learned counsel for the applicant relied upon the decision in the case of ***Sahil Singh Maniktala versus Harpreet Singh*** reported in 118 (2005) DLT 350 and ***Begum Aftab Zamami versus Shri Lal Chand Khanna*** reported in AIR 1969 Delhi 351. The latter judgement follows line of reasoning which was not accepted by the Supreme Court in the case of ***Shah Babu Lal Khimji versus Jayaben D. Kalia*** reported in (1981) 4 SCC 8. In our Order dated 27th February, 2007 we have also referred to the subsequent judgement of the Supreme Court in the case of ***Subal Paul versus Malina Paul*** reported in (2003) 10 SCC 361.

5. Judgement of this Court in ***Sahil Singh Maniktala & others versus Harpreet Singh and others*** reported in 118 (2005)

DLT 350 (DB) does not help the case of the appellant as in the said case no ex-parte stay was granted and the Order passed by the learned Single Judge refusing to grant ex-parte stay was taken up in Appeal. In ***Sahil Singh*** case (supra), the Court noticed that no party has right to claim ex-parte interim relief and a Judge has every right to decide the same after affording hearing to the other side. Thus, an Appeal under Section 10 of the Delhi High Court Act or Letters Patent Appeal may not be maintainable against an order refusing to grant ex-parte stay. Moreover, in paragraph 11 of the judgement, the Division Bench itself has noticed that in some cases an appeal may be maintainable. The factual position in the present case is to the contrary as an interim injunction order was passed by the learned Single Judge in the present matter. At the time when the Order dated 27th February, 2007 was being dictated in the Court, we had made it clear that we did not find any merit in the preliminary objection raised by the respondent regarding

maintainability of the Appeal.

6. It may be pointed out here that there is a typographical error in paragraph 5 of the Order dated 27th February, 2007. Full Bench decision of the Allahabad High Court in case of ***Zila Parishad versus Brahma is*** reported in AIR 1970 Allahabad 376 and not in AIR 1976 Allahabad 376. A wrong citation it is obvious, does not call for review or recall of the entire order. The said typographical mistake is however ordered to be corrected.

7. Learned counsel for the applicant further submitted that the judgement of the Supreme Court in the case of ***State of Haryana versus S.M.Sharma and others*** reported in AIR 1993 SC 2273 stands over-ruled in ***Secretary-cum-Chief Commissioner, Chandigarh versus Hari Om Sharma and others*** reported in JT 1998 (3) SC 654. We do not agree. In ***Hari Om Sharma*** (supra) the Supreme Court distinguished the decision in case of **S.M. Sharma** (supra), inter alia, holding that every person has right to be considered for

promotion provided he is eligible. There cannot be any dispute on the said proposition. It is well established. Right of the respondent to be considered for appointment is not disputed and not the controversy in issue. As and when regular appointment to the post in question is made, if the respondent is eligible, he has a right to be considered. ***S.M. Sharma's*** case (supra) specifically deals with ad hoc appointment or a stop gap conditional appointment. In ***S.M. Sharma's*** case (supra) it has been held that no one has a legal right to ask for and stick to current duty charge and the high court should not have entertained the writ petition. Prima facie, we also do not agree that the terms and conditions of the letter dated 8th November, 2005 are void being contrary to Section 23 of the Contract Act. Letter dated 8th November, 2005 stipulates the terms and conditions on which the respondent was entrusted with look after the charge of the post of Director-in-Chief (Sanitation), MCD. This aspect will be finally decided by the Ld. Single Judge

while disposing of the writ petition and appropriate directions can be given, if the applicant-respondent is successful.

8. Learned counsel for the respondent-applicant has also referred to some judgments of the Supreme Court in which it has been held that transfer or reversion, if malafide or contrary to public policy, is bad and can be set aside. No such plea at the time of arguments on 27th February, 2007 was raised. However, we have examined the reply to the Show Cause Notice filed by the respondent. The respondent in his counter-affidavit had raised plea of malafide in law and not malafides in fact. It was further alleged that the action of the appellant was arbitrary and affecting the respondent's right and career prospects. These are allegations which can be considered and decided by the learned Single Judge, while deciding the writ petition on merits.

9. Other Judgements relied upon by the applicant-respondent may now be noticed. In ***N.K. Singh versus Union of India,*** reported in 1994 (3) Service Law Journal 37 (SC), the

Supreme Court has held that transfer of a public servant holding a sensitive and important post has two aspects. Firstly, the private right of the public servant as an individual and secondly prejudice to public interest irrespective of the private right of the individual. However, the Supreme Court clarified that mere suspicion or likelihood of some prejudice to the public interest is not enough and there should be strong unimpeachable evidence to vitiate a transfer on the ground of public interest. Courts have to be extremely cautious and must show circumspection when allegation of prejudice to public interest is made. Learned counsel for the applicant-respondent drew our attention to paragraph 10 in ***V. Jagannadha Rao and others versus State of Andhra Pradesh and others*** reported in JT 2001 (9) SC 477. In the said paragraph, the Supreme Court has examined definition of the term transfer and held that a Government servant is liable to be transferred to a civil post in the same cadre which is normal feature and incidence of a

government servant. It has been also held that no government servant can claim right to stay at a particular place or in a particular post unless his appointment itself is to a specified non-transferable post. The said judgement does not support the contention raised by the applicant-respondent.

10. In ***Jagdish Prasad Shastri versus State of U.P. and others,*** reported in 1971 (2) SCR 583, learned counsel drew our attention to the observations of the Supreme Court at page 588. In this case the Supreme Court noticed that the name of the appellant therein had been directed to be struck off from the list of officers eligible for promotion and involved serious consequences.

11. The Supreme Court in ***State of U.P. and others versus Sughar Singh*** reported in AIR 1974 SC 423 was examining a case of reversion of one officer out of several others, who were officiating at higher posts. The order was held to be discriminatory as junior officers had been retained at the

officiating posts and it was admitted that the order of reversion was by way of punishment due to adverse entry in the character roll.

12. Similarly, in the case of ***Shrilekha Vidyarthi versus State of U.P.*** reported in AIR 1991 SC 537, the Supreme Court was examining en-block removal of all district government counsels in the State of U.P. It was held that there was a public element attached and Article 14 of the Constitution was attracted. In these circumstances, it was held that termination of all the district counsels without existence of any cause and cogent reason was arbitrary. The Court felt that the respondent State had resorted to a Spoils system alien to the constitutional scheme to throw out the government counsel. The said judgement deals with public interest aspect as highlighted by the Supreme Court in the case of ***N.K. Singh*** (supra).

13. In ***R.D. Gupta and others versus Lt. Governor*** reported in AIR 1987 SC 2086, it was held that ministerial staff in the

New Delhi Municipal Committee constituted a unified cadre. Distinction was drawn with the Municipal Corporation of Delhi in which there are three separate and independent wings. However, this does not in any way support the contention raised by the applicant-respondent that he could not be transferred, though he was appointed purely on Look After charge basis. In ***Delhi Water Supply and Sewage Disposal Committee and others versus J.P. Gupta and others*** reported in 36 (1988) DLT 378, the Supreme Court noticed that Municipal Corporation of Delhi has three separate municipal funds/accounts. The question arose in the said case whether Delhi Municipal Corporation Service Regulations, 1959 were applicable to the employees working in Water Supply and Sewage Disposal Committee. Keeping in view, Regulation 3 of the aforesaid Regulations, it was held that they apply only to those employees who are paid out of the general account.

14. We do not think that case for review of the Order dated 27th

February, 2007 is made out. Review Application and the Stay Application are accordingly dismissed. It is again clarified that the observations made in this order are only for the purpose of deciding the present review application and the writ petition shall be decided on merits without being influenced by any of the findings and observations made in this order.

(SANJIV KHANNA)
JUDGE

(DR. MUKUNDAKAM SHARMA)
CHIEF JUSTICE

MARCH 19, 2007.
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